IN THE MATTER OF ARBITRATION BETWEEN

KEMPS LLC - ROCHESTER	)	
	)	**ARBITRATION**
	)	**AWARD**
	)	
and	)	
	)	**SCHMIEDEBERG DISCHARGE**
	)	**GRIEVANCE**
	)	
	)	
TEAMSTERS LOCAL 160	)	
	)	**FMCS CASE NO. 050908-05615-7**
	)	

Arbitrator:	Stephen F. Befort
Hearing Date:	January 3, 2006
Date post-hearing briefs received:	February 6, 2006
Date of decision:	March 7, 2006
	APPEARANCES
For the Union:	Frederick Perillo
For the Employer:	James M. Dawson

INTRODUCTION

Teamsters Local 160 (Union) is the exclusive representative of a unit of production and maintenance employees working at the Kemps ice cream plant in Rochester, Minnesota. The Union brings this grievance challenging the decision of Kemps (Employer) to terminate the employment of Roger Schmiedeberg. The Employer contends that it terminated Schmiedeberg for engaging in harassing behavior in violation of both a posted company work rule and a posted harassment policy. The Union denies

that charge and maintains that the Employer did not have just cause to terminate Schmiedeberg. The grievance proceeded to an arbitration hearing at which the parties were afforded the opportunity to present evidence through the testimony of witnesses and the introduction of exhibits.

ISSUE

Did the Employer have just cause to discharge the grievant? If not, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE XXII

> Discharge Clause: The Employer shall not discharge any employee without just cause and shall give at least one (1) warning in writing to the employee and a copy of the same to the Union, except that no warning notice need be given to an employee before he is discharged if the cause of such discharge is dishonesty, drunkenness, or recklessness resulting in serious accident while on duty or violation of properly posted Company rules which do not conflict with the agreement, carrying of unauthorized passengers or any serious or significant gross offense. The warning notice as provided herein shall not remain in effect for a period of more than twelve (12) months from date of said warning notice. Discharge must be by proper written notice to the employee and the Union. Any employee may request an investigation as to the discharge provided that a grievance challenging the discharge has been filed with the Employer within seven (7) calendar days after the discharge or knowledge thereof. If through a grievance or arbitration meeting it is determined an employee has been unjustly discharged, he/she shall be reinstated and shall be compensated for lost time according to the decision or agreement reached in said grievance or arbitration meeting.

EMPLOYER POLICIES

Work Rules

> 18. Harassment in any form will not be tolerated and should be reported to a manager as soon as possible.
>
> 20. These rules, along with the Union contract, will be followed. Violators of these rules may receive warning letters and possible discharge.

Harassment & Offensive Behavior Policy

Marigold Foods [Kemps] is committed to promoting a productive and respectful work environment that is free from harassment.

This policy applies to harassment that violates any applicable law and also prohibits conduct that, while not necessarily illegal, is inconsistent with Marigold Foods, Inc.'s harassment policy

Definition of Harassment. Harassment is visual, verbal or physical conduct that has the intent or effect of unreasonably interfering with work performance, or which creates an intimidating, hostile or offensive work environment. Harassment may be based upon race, color, religion, gender, age, national origin, disability, marital status, sexual orientation, military status, or any other status or condition protected by state or federal law.

Sexual Harassment:

Sexual harassment is expressly prohibited. Sexual harassment is unwelcome sexual advances, requests for sexual favors, or other visual, verbal, or physical conduct of a sexual nature when any of the following conditions are present:

- The conduct unreasonably interferes with an employee's job performance;
- The conduct creates an intimidating, hostile or offensive work environment;

Examples of Prohibited Conduct (sexual and other types of harassment):

- Verbal comments such as derogatory comments, epithets, slurs or explicit jokes based on an individual's protected class status;
- Use of an offensive or demeaning term which has a sexual connotation;
- The creation of an atmosphere in which an employee's work, property, or reputation are demeaned because of the employee's protected class status;

Responsibilities

Employees

All employees are responsible for complying with this policy by maintaining and supporting a work environment free from intimidation and harassment. Toward that end, any employee who believes that he or she has become aware of an

incident of harassment, whether by witnessing the incident, being told of it, or experiencing it personally, must follow the guidelines set forth below.

* * *

- If you feel comfortable doing so, attempt to stop the harassment or inappropriate behavior immediately. Advise the person engaging in the harassment or inappropriate behavior that the behavior is inappropriate and that the behavior should be stopped.

- If you choose not to confront the person engaging in the harassing or inappropriate behavior, or the person refuses to respect your request, report the situation immediately to your supervisor.

All incidents of prohibited harassment that are reported to management will be investigated in a thorough and timely manner. . . .

If Marigold Foods, Inc. determines that an individual violated this policy, or that prohibited harassment has occurred, appropriate disciplinary action, up to and including termination of the employee or business relationship, will be taken.

FACTUAL BACKGROUND

The Employer operates an ice cream processing plant in Rochester, Minnesota. The Employer employs approximately 117 production and maintenance employees who are covered by the parties' collective bargaining agreement.

Roger Schmiedeberg has worked for the Employer for the past sixteen years. He usually works in the Amerio Room which is located in the plant's larger Wrapper Room. The Wrapper Room contains five work stations at which the tops of ice cream containers are sealed and then packaged for shipping. The sealing process is accomplished as the containers move along conveyor belts through ovens at each station that heat and shrink the plastic seals on the ice cream containers. The Wrapper Room is very noisy, and employees working in that location are required to wear ear plugs.

On the morning of August 22, 2005, Schmiedeberg was assigned to work on station 1 in the Wrapper Room rather than in the Amerio Room. Co-workers Kelly

Johnson and Kim Clausen were assigned to nearby Stations 2 and 3, respectively. Clausen testified that Schmiedeberg expressed unhappiness with the unexpected reassignment.

About mid-morning on that day, a jam occurred on the station 2 line. Such jams are common, and the employees are aware that they need to clear jams quickly in order to avoid containers backing up into the oven and ruining the ice cream product. Johnson climbed up a catwalk in an effort to clear the jam. Noticing a second jam at a different point along the station 2 line, Johnson yelled for help. Both Clausen and Schmiedeberg moved toward station 2 and a verbal altercation occurred. Beyond these facts, the stories of Clausen and Schmiedeberg diverge.

According to Clausen, she went to station 2 in response to Johnson's request and began to work at clearing the jam. While doing so, Clausen noticed that product was backing up in the oven and she asked Schmiedeberg, who was standing a few feet away, for help. Clausen testified that Schmiedeberg responded by angrily yelling, "Fuck you bitch! You're not my boss." Clausen testified that she was taken aback by this angry outburst and that she took a step backwards. She claims that Schmiedeberg then said, "You want to hit me go ahead. I don't care if you fucking tell on me." Clausen testified that she never raised a fist or made any other type of threatening gesture toward Schmiedeberg. Clausen walked away following the exchange and returned to station 3. According to Clausen, Schmiedeberg did nothing to assist in clearing the backup on line 2.

Schmiedeberg's version is quite different. He testified that both Clausen and he arrived at station 2 at about the same time and that each began efforts to clear different

portions of the jam. Schmiedeberg claims that Clausen then proceeded to yell angrily at him, to which he responded, "Shut the heck up!" Schmiedeberg testified that he did not appreciate Clausen yelling at him so loudly, and that he was merely trying to get her off his back. Schmiedeberg denied using any profanity in his remarks.

No one else heard the exchange between Clausen and Schmiedeberg. Johnson, who was up on the catwalk at the time, could see but not hear the exchange. Johnson testified that she could tell from Schmiedeberg's actions that he was angry and upset.

Shortly after the incident in question, lead foreman Ken Feind spelled Clausen for a break on station 3. Clausen was crying at the time, and Feind asked her what was wrong. According to the testimony of both Clausen and Feind, Clausen responded by stating that she was too upset to talk about it right now, but stated that "Roger was out of control." Following the break, Clausen described the exchange to Feind. According to both Clausen and Feind, the description related by Clausen was consistent with Clausen's testimony at the hearing. Feind then reported the matter to Plant Manager Mike Hanisch. Hanisch, who was away from the plant at the time, directed Feind to send Schmiedeberg home on a paid suspension pending investigation.

Later that same day, Hanisch interviewed Schmiedeberg, Clausen, and Johnson. During the interview with the grievant, Schmiedeberg denied calling Clausen a "fucking bitch," but admitted that he had told her, "you're not my fucking boss." Hanisch testified that Clausen's testimony at the arbitration hearing was consistent with what she had told him during the August 22 interview.

Hanisch also asked Feind and Foreman Les Backus for their recommendations on how the Employer should respond to the altercation. Both lead workers (although

members of the bargaining unit) recommended that Schmiedeberg be terminated on the theory that any lesser discipline was not likely to correct Schmiedeberg's behavior. Both acknowledged at the hearing that they had not interviewed Schmiedeberg personally before offering their recommendations.

The hearing record also establishes two additional facts. First, the record shows that the Employer had posted and distributed both a set of work rules which prohibit "harassment in any form" and a harassment policy which prohibits harassing behavior that "creates an intimidating, hostile or offensive work environment." Schmiedeberg testified that he was aware of both policies.

Second, the record establishes that Schmiedeberg has had ongoing problems with his verbal behavior. Clausen and Johnson both testified that they had observed Schmiedeberg previously refer to female employees as "fucking bitches." Backus testified that he had received complaints concerning Schmiedeberg's use of profane language, including use of the term "fucking bitch," and had warned Schmiedeberg not to use such language. The Employer previously had suspended Schmiedeberg on two occasions (in March 2002 and May 2004) for using vulgarity directed at other employees. On each occasion, Schmiedeberg was warned that a future violation could result in termination. Hanisch testified that he decided to discharge Schmiedeberg following the August 22 incident, at least in part, because the grievant had failed to correct his behavior in spite of these warnings.

POSITIONS OF THE PARTIES

Employer:

The Employer contends that it had just cause to terminate the grievant for engaging in a serious episode of sexual harassment on August 22, 2005. The Employer initially argues that Clausen's testimony provides the most credible version of the incident in question. As depicted by Clausen, Schmiedeberg engaged in an unprovoked and demeaning verbal barrage that clearly violated the Employer's posted anti-harassment policies. The Employer maintains that termination for a serious rule violation of this type is authorized by the parties' collective bargaining agreement even in the absence of a warning letter issued within the preceding twelve months. The Employer concludes that a lesser sanction would be inappropriate under the circumstances because Schmiedeberg has continued to engage in a pattern of hostile verbal behavior in spite of prior discipline and repeated warnings that any further rule violations could result in the termination of employment.

Union:

The Union counters that the Employer does not have sufficient cause to justify its discharge decision. The Union argues, first of all, that Schmiedeberg's conduct only involved shop talk that does not rise to the level of sexually-based harassment forbidden by the Employer's work rules. In addition, the Union points to Article XXII of the parties' agreement which provides that the Employer ordinarily must give an employee a warning notice within a preceding twelve-month period before it can discharge an employee. While Article XXII contains an exception for an employee's violation of properly posted work rules, the Union contends that the Employer's harassment policy

does not qualify as a work rule because it does not set out a predictable schedule of offenses and penalties. The Union also lodges a procedural objection, claiming that the Employer's investigation of the incident was unfairly one-sided in that two supervisors who participated in the termination deliberations interviewed Clausen but not Schmiedeberg. In the end, the Union asserts that under any view of the circumstances, a single expression of profanity is not so egregious as to warrant the ultimate penalty of discharge.

DISCUSSION AND OPINION

In accordance with the terms of the parties' collective bargaining agreement, the Employer bears the burden of establishing that it had just cause to support its termination decision. This inquiry typically involves two distinct steps. The first step concerns whether the Employer has submitted sufficient proof that the employee actually engaged in the alleged misconduct or other behavior warranting discipline. If that proof is established by a preponderance of the evidence, the remaining question is whether the level of discipline imposed is appropriate in light of all of the relevant circumstances. *See* Elkouri & Elkouri, HOW ARBITRATION WORKS 948 (6th ed. 2003).

A. The Alleged Misconduct

This grievance presents a classic "he said, she said" controversy. If Clausen's testimony is to be believed, Schmiedeberg's comments ("Fuck you bitch! You're not my boss.") clearly constituted a violation of the Employer's harassment policies. On the other hand, if Schmiedeberg's testimony is to be believed, his comments ("Shut the heck up!") constituted little more than an ornery exchange that falls far short of a policy violation. Unfortunately, no one else overhead what the two employees said.

Despite this divide in the testimony, I believe that Clausen's story presents the more credible version in light of the weight of the circumstantial evidence. This evidence includes the following:

1) Clausen's description of the incident has remained consistent throughout her discussions with Feind and Hanisch and in her testimony at the arbitration hearing. Schmiedeberg's description, in contrast, has not remained constant. Most significantly, Hanisch testified that during his August 22 interview with Schmiedeberg, the latter acknowledged telling Clausen, "you're not my fucking boss." At the hearing, Schmiedeberg denied making that statement.

2) Clausen's demeanor following the incident was consistent with the events that she described. Feind found Clausen crying and too upset to explain what had happened shortly after the altercation except to blurt out that "Roger was out of control." Meanwhile, Schmiedeberg, in his testimony, denied being angry at Clausen during the verbal exchange, a fact seemingly contradicted by Johnson who testified that Schmiedeberg seemed angry and upset to her visual observations.

3) Schmiedeberg's assertion that he told Clausen to "shut the heck up" is curious in the context of the verbal exchange. Schmiedeberg's testimony was to the effect that he made the statement in response to some comments yelled by Clausen. But, he never explained what types of comments Clausen allegedly made. In contrast, Clausen's claim that Schmiedeberg's angry outburst was a rebuff to her request for help in clearing the jammed line appears to be more plausible.

4) Schmiedeberg testified that he assisted in clearing the jam near station 2, while Clausen testified that Schmiedeberg did nothing to help. Johnson, based on her observations, corroborated Clausen's testimony.

5) The record shows that Schmiedeberg had used language similar to that alleged by Clausen in prior incidents.

6) The record contains no indication of any motive for Clausen to fabricate her version of the incident.

On the whole, I found Clausen to be a far more credible witness than Schmiedeberg. The testimony of other bargaining unit employees, who also credited Clausen's version, bolstered this assessment. Accordingly, I conclude that the Employer

has carried its burden in establishing that the grievant engaged in the misconduct alleged as the basis for termination. The comments Schmiedeberg made to Clausen on August 22, 2005 ("Fuck you bitch! You're not my boss.") are profane, demeaning, and sexual in nature. The statements create an intimidating and offensive work environment and clearly violate the Employer's policies prohibiting workplace harassment.

B. The Appropriate Penalty

The Employer's argument in support of its discharge decision is relatively straightforward. According to the Employer, the grievant committed a serious violation of its anti-harassment policies. This violation, moreover, is consistent with an ongoing pattern of vulgar and sexually inappropriate remarks. Since prior discipline and warning have failed to correct the grievant's conduct, the Employer contends that discharge is the only viable remaining option.

The Union, however, raises a number of defenses to this line of reasoning. These objections are discussed below.

1. Article XXII

The Union's first line of defense is provided by Article XXII of the parties' collective bargaining agreement. This provision limits the Employer's discretion to terminate an employee by the following language:

> The Employer shall not discharge any employee without just cause and shall give at least one (1) warning in writing to the employee and a copy of the same to the Union, except that no warning notice need be given to an employee before he is discharged if the cause of such discharge is dishonesty, drunkenness, or recklessness resulting in serious accident while on duty or violation of properly posted Company rules which do not conflict with the agreement, carrying of unauthorized passengers or any serious or significant gross offense. The warning notice as provided herein shall not remain in effect for a period of more than twelve (12) months from date of said warning notice. Discharge must be by proper written notice to the employee and the Union.

The Union argues that discharge is precluded by this provision since it is undisputed that the Employer did not provide a warning notice to the grievant during the preceding twelve month period.

The Employer counters that Article XXII contains two exceptions to the warning notice requirement. First, that provision states that "no warning notice need be given to an employee before he is discharged if the cause of such discharge is . . . [the] violation of properly posted Company rules which do not conflict with the agreement." The Employer asserts that the grievant's conduct in violation of the posted work rules and harassment policy serves to dispense with the warning notice requirement in this instance. Second, Article XXII exempts discharges for "any serious or significant gross offense" from the twelve-month warning notice requirement. The Employer also maintains that the grievant's comments during the August 22, 2005 incident were sufficiently serious as to come within this second exception.

The Union, in turn, contends that the harassment policy should not be considered a properly posted work rule for purposes of Article XXII. The Union offers two arguments in support of this proposition. The Union first points out that the harassment policy is not denominated by its title as a "work rule." The Union further argues in its post-hearing brief that "a mere policy which does not contain a schedule of offenses and penalties is clearly not the type of exception intended in Article XXII."

These arguments are not persuasive. The harassment policy is a work rule in all but formal label. It sets out a description of proscribed behavior. An employer generally has the prerogative to adopt a reasonable work rule or policy that seeks to curb harassing behavior so long as it is not in conflict with the parties' collective bargaining agreement.

Moreover, the policy expressly puts employees on notice of the sanctions that could result from violating the policy through the following language:

> If Marigold Foods, Inc. determines that an individual violated this policy, or that prohibited harassment has occurred, appropriate disciplinary action, up to and including termination of the employee or business relationship, will be taken.

To find that the harassment policy is not a work rule under these circumstances would elevate form over substance. A violation of the harassment policy, accordingly, comes within Article XXII's exception for a notice warning requirement.

The Union also reads Article XXII as requiring that all prior discipline must be disregarded after a twelve-month period. This, however, reads too much into this limitation. The language only states that the alarm triggered by a required warning notice may not ring more than twelve months later. It does not say, as some contracts do, that prior disciplinary events expire and cannot be considered in the usual calculus of progressive discipline. Since a warning notice is not required in the context of this grievance, Article XXII does not preclude reference to an ongoing pattern of rule violations.

2. The Investigation

The Union further maintains that the Employer's discharge decision is tainted by a one-sided investigation. The Union points out that two lead workers who were asked to provide recommendations in this matter (Feind and Backus) interviewed Clausen, but not Schmiedeberg. This objection, although factually accurate, is not fatal. Feind and Backus are bargaining unit members and have no authority to impose discipline. Plant Manager Hanisch, the individual with supervisory authority who made the discharge decision, did interview Schiedeberg, Clausen, and everyone else who worked in the

Wrapper Room area. Although Hanisch sought the recommendations of Feind and Backus, the investigation conducted by the ultimate decision-maker was not devoid of fundamental fairness.

3. Degree of Misconduct

Finally, the Union claims that, under any circumstances, a single expression of profanity does not warrant the ultimate penalty of discharge. In support of this contention, the Union points out that the use of profanity is common in many workplaces.

This argument fails for several reasons. First, the comments uttered by the grievant in this instance go beyond that of a mere profane utterance. Schmiedeberg's statements to Clausen were intimidating and sexually demeaning to a fellow employee. The statements constituted a verbal assault squarely forbidden by both the letter and spirit of the Employer's harassment policy.

Employers, for good reason, increasingly are on guard against sexual harassment in the workplace. The United States Supreme Court has ruled that employers who do not establish and enforce rules against sexual harassment are more likely to be held liable for incidents of workplace harassment. Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 1998). In this environment, arbitrators tend to support reasonable efforts by employers to deter sexually harassing conduct.

Moreover, Schmiedeberg's outburst was not an isolated incident. The record indicates that the grievant frequently has used the term "fucking bitch" to refer to female co-workers. The Employer has twice disciplined Schmiedeberg for similar comments and warned that further outbursts of a similar nature would warrant termination. Perhaps

most telling, four members of Schmiedeberg's bargaining unit testified to their belief that Schmiedeberg would repeat such behavior if reinstated.

The purpose of discipline is to correct errant behavior. Discharge is appropriate when a course of progressive discipline is unsuccessful in accomplishing that goal. Under the circumstances of this case, the Employer's discharge decision is reasonable and is supported by just cause.

AWARD

The grievance is denied.

Dated: March 7, 2006

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Stephen F. Befort
Arbitrator